STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES,	)	
Complainant,	)	CASE 20172-U-06-6447 DECISION 9551 - PSRA
vs.	)	CASE 20188-U-06-5148 DECISION 9552 - PSRA
WASHINGTON DEPARTMENT OF SOCIAL & HEALTH SERVICES,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	)	

Younglove Lyman & Coker, by *Edward E. Younglove*, Attorney at Law, for the union.

Attorney General Rob McKenna, by *Donna Stambaugh*, Assistant Attorney General, for the employer.

The Washington Federation of State Employees (union) filed two unfair labor practice complaints against Washington State (employer) and the state Department of Social & Health Services (agency) on February 10, 2006. The union filed amended complaints on February 24, 2006, and the Commission issued preliminary rulings on March 29, 2006.

The complaints alleged the employer interfered with employee rights and refused to bargain when it contracted out remodeling work at Lakeland Village, without providing an opportunity for bargaining to the union that represents both the supervisory and non-supervisory bargaining units. Hearing Examiner Karl Nagel held a hearing on August 3 and 4, 2006, in Spokane, Washington. The parties filed post-hearing briefs on October 13, 2006.

ISSUE

Did the employer commit an unfair labor practice by contracting out bargaining unit work?

On the basis of the record, the Examiner holds that the work in question did not belong to the bargaining unit. Consequently the employer had no duty to bargain the decision to contract out that work and the employer committed no unfair labor practice by contracting without bargaining.

APPLICABLE AUTHORITIES

RCW 41.80.110(1)(e) provides it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. RCW 41.80.005(2) defines "collective bargaining" as the "performance of the mutual obligation . . . to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020. . . ." The scope of bargaining set forth in RCW 41.80.020 includes "wages, hours, and other terms and conditions of employment."

The Commission's interpretations of similar statutory language in other statutory schemes administered by the Commission are persuasive when interpreting provisions of the Personnel System Reform Act (PSRA) in Chapter 41.80 RCW. *Community College District 19 (Columbia Basin) (Washington Public Employees Association)*, Decision 9210 (PSRA, 2006); *State - Natural Resources*, Decision 8458-B (PSRA, 2005).

The continued existence of an employee's job is at the heart of the employer-employee relationship, and any decision to transfer the work of bargaining unit employees to persons outside of the

bargaining unit may affect that existence and directly affects the wages, hours and working conditions of bargaining unit employees. *Skagit County*, Decision 8746-A (PECB, 2006); *South Kitsap School District*, Decision 472, (PECB, 1978).

The decision to contract out can be a mandatory subject of bargaining. The Commission considers five factors when determining whether a transfer of work triggers a duty to bargain. *Skagit County*, citing *Port of Seattle*, Decision 7271-B (PECB, 2003); *City of Anacortes*, Decision 6863-B (PECB, 2001); *Spokane County Fire District 9*, Decision 3482-A (PECB,1991). They are:

> 1. The previously established operating practice as to the work in question (*i.e.*, had non-bargaining unit personnel performed such work before?);
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> 2. Whether the transfer of work involved a significant detriment to bargaining unit members (*e.g.*, by changing conditions of employment or significantly impairing reasonably anticipated work opportunities);
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> 3. Whether the employer's motivation was solely economic;
>
> 4. Whether there had been an opportunity to bargain generally about the changes in existing practices; and
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> 5. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

Previous to the PSRA, Chapter 41.06 prohibited the contracting out of work that could be performed by civil servants. The PSRA changed that prior law and allowed the employer to purchase services by contract that had previously been performed by employees. RCW 41.06.142. The Commission does not have authority to determine whether the employer and agency complied with the contracting out statute or even if that statute applies to the type

of work at issue here. The Commission has unfair labor practice jurisdiction under RCW 41.80.110 to examine whether the actions affect a mandatory subject of bargaining, thereby triggering an obligation to bargain in good faith.

RCW 41.80.020(7) specifically states the employer and union can bargain over those contracts authorized under the PSRA. The employer and the union bargained the general issue of contracting out during their negotiation sessions leading to the 2004-2007 master agreement, but they included no language in the agreement concerning the subject.

ANALYSIS

The union is the exclusive representative of supervisory and non-supervisory bargaining units of state employees employed by the agency in the operation and maintenance of mental health and developmental disability institutions around the state. Some of those represented employees perform traditional construction trades and crafts duties.

While almost every institution has employees that do some of this type of work, the institutions located at Medical Lake, Washington, have centralized their trades and crafts employees in Consolidated Support Services (CSS). CSS repairs and maintains the physical plants of both campuses of Eastern State Hospital and Lakeland Village. Because of the concentration of institutions at Medical Lake, CSS has more pure trades employees than other institutions in the state. For example, CSS fully employs individual carpenters, electricians and painters within their trades where a smaller location can only support a few maintenance workers that are more "jacks-of-all-trades." That size and makeup of the CSS staff allows it to perform larger and more specialized

construction and maintenance tasks than other locations in the bargaining unit.

The particular jobs at issue in this case are two capital projects, funded by legislative action separate from the agency's approved operational budget. The two projects were remodeling work at Lakeland Village that the employer contracted to outside vendors. The first is the remodeling of four residential cottages and the second is replacing flooring in the PAT Center.

Cottage Remodels

Previously, in 1998 and 1999, the agency undertook the remodeling of Ponderosa Cottage at Lakeland Village, utilizing capital funds allocated by the legislature. CSS employees did most of the remodeling, with outside contractors doing some of the work. In 2000 and 2001, CSS employees remodeled another three cottages, albeit with additional work done by outside contractors. For the latter part of the project, the union and the agency had agreed CSS could do most of the work, but also specifically agreed that it "sets no precedent at CSS or anywhere else within DSHS regarding how capitol (sic) projects are accomplished."

The Legislature subsequently appropriated $1.56 million to the agency in the 2003-2005 biennium to renovate the remaining four cottages at Lakeland Village. Design work began in 2003. In the spring of 2004, union stewards at CSS became aware of the agency's plans. The union representatives understood that a pending closure of another institution and the resultant need to transfer residents to Lakeland created a tight time frame for completion of the project. The union's representatives told CSS management that the CSS employees could not do the whole project because of the timing, but wanted to do the work on one of the cottages, Tamarack, while the agency contracted out the work on the others. This was

confirmed in a e-mail between the CSS supervisor and a CSS union representative in August 2004.

After consideration, the agency held off action on the project until after July 2005. Several factors apparently entered into the agency's consideration: concern that the Association of General Contractors might sue the state if the agency did not bid the remodeling as a public works project; the potential bad timing of such a lawsuit before the gubernatorial elections; a lessening of the time pressure to move residents to Lakeland, and the July 1, 2005, effective date of the new collective bargaining agreement between the employer and the union.[1]

After July 1, 2005, the agency let bids for the remodeling of the four cottages and in the fall of 2005, the agency signed a contract with an outside construction firm to do the work. The work ultimately performed by outside contractors consisted of constructions trades work similar in nature, if not in overall scope, to the construction trades work performed by CSS employees.

PAT Center Flooring

At issue here is the replacement of the vinyl flooring and coving in an area of a therapy building at Lakeland. The project also included leveling the floor, and abating the old adhesive and asbestos. The specifications for the job required the use of a particular leveling compound. While carpenters in CSS have previously laid flooring, CSS employees did not do asbestos abatement work and CSS employees were not certified to apply the leveling compound.

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[1] These considerations are contained in a March 11, 2005, briefing paper prepared by the agency's Chief of the Office of Capital Programs Robert Hubenthal admitted as evidence.

The agency and the CSS employees discussed the PAT Center flooring as a potential project as early as 2003. The agency and the CSS employees discussed it again in 2004, without resolution. In May 2005, CSS Administrator Terry LaFrance sent the job specifications to the carpenter shop supervisor, the maintenance manager and the union's Chief Shop Steward, Stan Hall. Carpenter Shop Supervisor Gary Cline told him that the shop had no experience with the Ardex floor leveling compound that the flooring company required to meet its warranty. A few days later, Hall e-mailed LaFrance saying the union's position considered the installation of the flooring to be bargaining unit work. He did concede that the asbestos abatement and floor leveling were not, but claimed the installation of the flooring and coving. In August 2005, the CSS union stewards found that the entire job had been let for bid.

Applying the legal factors cited above to the facts of this case:

1. The previously established operating practice as to the work in question (*i.e.*, had non-bargaining unit personnel performed such work before?);

The work at issue here is construction trades work, the remodeling of buildings to correct mold problems, mitigating damage and rehabilitating older buildings. Members of the bargaining unit have done this type of work before. Contractors have also done this work before. As the testimony and evidence made clear, the agency has a mixed practice of having this type of work done in-house sometimes and then contracting the work out on other occasions.

Many capital projects are completed every year within the agency. For example, according to calculations performed on summaries

introduced by the employer, the numbers of capital projects in the 2003-2005 biennium were:

Entire Bargaining Unit	
- In House	65
- Contracted Out	94
Total	159
CSS/Eastern/Lakeland	
- In House	19
- Contracted Out	17
Total	36

This shows that employees at CSS do more of this type of project than do other skilled maintenance workers in the bargaining unit. It also demonstrates that CSS did 53% of the capital projects in its physical area, while the other 47% were performed by contractors.

The total amounts spent in the 2003-2005 biennium for capital projects is also revealing:

Entire Bargaining Unit	
- In House	$ 850,618
- Contracted Out	$ 54,790,224
CSS/Eastern/Lakeland	
- In House	$ 405,844
- Contracted Out	$ 1,854,960

This demonstrates that agency contracted out the biggest and most expensive projects. The amount spent on capital projects awarded to outside contractors dwarfs the amount spent on capital projects

performed by employees. It is reasonable to assume larger projects need more hours of skilled trades work, so it would follow that contractors performed more of the total man-hours of trades work funded under capital projects than did employees.

The union and the agency have a long history of discussion about whether the agency should use CSS staff to complete particular projects or whether the project should go out to bid. Examples of this include the remodeling of the previous cottages in 1998 and 2000. The union waived the precedential value of the 2000 remodels in an agreement with the agency to do that work, but the record contains many other examples of the agency soliciting (through its CSS employees and union representatives) the union's opinion on whether the employees could do the work or wanted to do the work.

As the agency neared the end of the project design phase of a capital project, the project manager would review the proposed work with CSS management and the union leaders at CSS. Management would explain the work proposed and the union would provide its opinion on whether the work could be done by the CSS employees. If the union opted not to undertake the work, the agency prepared for public bid. If the employees decided they wanted the work, the agency would review the union's proposal. If the agency decided to have the employees do the work, then the parties would discuss the cost, schedule, and personnel commitment. The agency's Capital Programs office would issue a journal voucher to reimburse CSS with capital funds for its expenses.

All this shows that having trades work performed by contractors is nothing new at CSS. In the instances at issue here, the difference in practice occurred in the manner in which the agency discussed the potential contracting out with the union. That factor is dealt with later in the analysis.

2. Whether the transfer of work involved a significant detriment to bargaining unit members (*e.g.*, by changing conditions of employment or significantly impairing reasonably anticipated work opportunities);

The bargaining unit members realized no significant detriment as a result of the contracting out of these two projects. No reductions in force occurred as a result; no conditions of employment changed as a result of these two bids. The minimal effects of these contracts on the CSS workforce pales in comparison to the deprivations visited upon the bargaining unit members in previous Commission contracting and skimming cases. In *South Kitsap*, the school district employer laid off all teacher's aides and replaced them with certificated teachers. In *Skagit County*, an employer contracted out several existing ferry boat runs to an independent contractor running another boat, resulting in less opportunity for work for bargaining unit members. The employees here did not suffer such deprivations. Even the skimming cases arising from higher education institutions exempting employees from bargaining units demonstrate greater impact as work directly performed by the former unit members leaves the unit with the exempted employee, resulting in fewer unit employees and fewer promotional opportunities for those that remain. *Western Washington University*, Decision 9010 (PSRA, 2005); *University of Washington*, Decision 9410 (PSRA, 2006).

3. Whether the employer's motivation was solely economic;

There was an economic component to the employer's motivation in letting these contracts. Witnesses testified that one of the employer's interests in contracting out the work was the existence of a warranty period where the outside contractor had to guarantee their work for a year after the employer accepted the work.

Witnesses also testified that products, such as the flooring, would be warrantied only if the leveling compound beneath it were installed by a trained installer. Those reasons are economic; if a problem arose during the warranty period the contractor was responsible to fix it, not the employer.

At the same time, the employer and agency was concerned about complying with the public works law and the effect of the new master contract under the new collective bargaining law. The agency had heard an association of general contractors was considering filing suit if the agency did not let the cottage remodels out to bid. Documents submitted as evidence also show the agency was concerned about setting precedents under the new collective bargaining agreement as they might affect contracting out, past practices in general and management rights. The union did not demonstrate an anti-union animus or any other improper motivation for the employer's action.

4. Whether there had been an opportunity to bargain generally about the changes in existing practices; and

I have previously found these contracts were not a real change in existing practices. The real change was in the manner in which the parties discussed those projects. Prior to these contracts being let, the agency asked the union if it thought CSS could do the work.[2] In both instances, the union replied that the employees wanted to do part of the specified work, but not the whole jobs.

The agency apparently did not engage in further discussion with the union on the jobs until Chief Shop Steward Hall sent LaFrance an e-

[2] The cottage remodels in 2004 and the PAT center flooring in 2005.

mail on August 5, 2005. Hall asked if the agency intended to submit a notice of a change in a mandatory subject of bargaining to the executive director of the union pursuant to Article 38 of the new master contract. LaFrance replied in August 17, 2005, that the agency would not do so. He contended in the letter that the prior process on capital projects violated the public works law and the new master contract, which became effective July 1, 2005, specifically eliminated the past practice of discussing such matters with the union.

The employer and the union bargained the general subject of contracting out during the master contract negotiations under the PSRA in 2004, but did not add language to that contract concerning that subject. As part of the master negotiations, the employer and the union did not bargain these specific projects. They did, however, agree on language that affects this issue.

The master contract specifically nullifies any past practice not specifically referred to in the agreement. Article 46.1 states:

> This agreement constitutes the entire agreement and any past practice or past agreement between the parties - whether written or oral - is null and void, unless specifically preserved in this Agreement.

That language clearly says any past practice, unless specifically carried forward, ends here. The practice of notifying and discussing capital projects with the employees at CSS is not referenced elsewhere in the agreement.

In response, the union, points to Article 46.4:

> During the negotiations of this Agreement, each party had the unlimited right and opportunity to make demands

> and proposals with respect to any subject or matter appropriate for collective bargaining. Therefore, each party voluntarily and unqualifiedly waives the right and will not be obligated to bargain collectively, during the term of this Agreement, with respect to any subject or matter referred to or covered in this Agreement. *Nothing herein will be construed as a waiver of the Union's collective bargaining rights with respect to matters that are mandatory subjects/topics under the law.*

The union argues that the italicized language demonstrates there is no union waiver of mandatory subjects of bargaining in the master contract. I believe that is a very broad interpretation of that clause. Be that as it may, it still does not affect the agreement to eliminate previous past practices. That elimination is not a waiver of a mandatory subject, it is a affirmative statement that what happened before the new master contract is not controlling. Since the union agreement on the termination of past practices effectively eliminated the practice of how the agency discussed capital projects with the union, there is no actionable claim on that issue here.

The union demanded to bargain these particular projects, and the employer responded with an offer to bargain the effects of the projects. The employer asked the union to identify what effects should be bargained. The union did not respond and no effects bargaining occurred.

5. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

Is the "nature of the work" the physical actions taken by each employee to perform an individual task or is it the collection of tasks as a whole? Many types of employees can swing a hammer, but

a carpenter is needed to measure, cut, join, and fasten to create cabinetry. If it is the collection of those tasks that is the fundamental nature of the work, does that nature change with volume or funding source?

The fundamental nature of the work performed by the contractors is not different from the trades work performed by members of the bargaining unit in CSS. The difference comes in the scope of the work, the size of the multiple cottage remodels, the specialized tasks required in the PAT flooring replacement, and work that the employees were not certified to perform.

The examiner's decision in *Community Transit,* Decision 3069 (PECB, 1988), suggests that I consider whether the work *could have been done* by the employees when examining if it was bargaining unit work. The union argues the work could have been done because the union has remodeled cottages in the past. The agency argues that the work could not have been done because, as the union representatives said themselves, they could only do one of the four cottages. That brings me back to the question posed above, what quality is the fundamental nature of the work?

A review of various cases may be of assistance. *Fibreboard Paper Products Corp.*, 379 U.S. 203 (1964), is a leading Supreme Court case on the duty to bargain the decision to sub-contract unit work. There the company notified the union, after the contract covering its plant maintenance workers expired, there was no need to bargain a new contract because it was going to contract out that function. The work was still being done in the same location, ultimately supervised by the company and "functioned as an integral part" of the company. The exact same work remained, with no difference in amount of level of difficulty, only the employees who used to do it were no longer there.

In *AMCAR Division,* 596 F.2d 1344 (8th Cir., 1979), a company contracted out the rebuilding of two machine presses and numerous other machining, carpentry, and plumbing tasks. The court analyzed all of the tasks involved separately on its way to finding a violation of the duty to bargain. For example, in regard to the rebuilding of the machine presses, the employer argued it was a complete, complex rebuilding that its employees lacked the skills and available time to do. The court, however, found substantial evidence in the NLRB record that the employees had performed, from time to time, all of the separate elements of the job.

However, the courts in both *Fibreboard* and *AMCAR Division* place significant reliance upon the impact of the contracts on bargaining unit members. In *Fibreboard* the Supreme Court found the contracting out significantly impaired reasonably anticipated work opportunities as 20 qualified maintenance employees were on layoff status on the date the contract was let. In addition, three justices concurred in the decision, noting it was limited to situations where employees were *replaced* by an independent contractor.

Although the court in *AMCAR Division* analyzed each of the tasks contracted out, it also analyzed whether each contract impacted any employees. Even though the bargaining unit had plumbers and pipefitters, the court found the contracting out of the replacement of valves, a six-inch water main, and a valve pit could have taken place without bargaining. Even though employees commonly performed the tasks, the contracting out of those tasks without bargaining was not illegal because no employees of that type were unemployed on the dates the contractors performed the work. Because no employees were affected, there was no change in the conditions of employment.

In *Westinghouse Electrical Corp.*, 150 NLRB 1574 (1965), a union challenged the letting of contracts at a manufacturing plant without bargaining. An NLRB trial examiner heard the case and found the employer committed an unfair labor practice by failing to bargain with the union before contracting out work "which could have been performed by equipment and manpower within the bargaining unit," citing *Fibreboard*.

On appeal, the NLRB overturned the examiner. The Board first noted the cases where it found a violation "invariably" contained facts showing the contracting out:

- "involved a departure from previously established operating practices,"
- "effected a change in conditions of employment," or
- "resulted in a significant impairment of job tenure, employment security or reasonably anticipated work opportunities."

150 NLRB at 1576.

In *Westinghouse*, The Board determined there was no departure from the norm in that case. The complaint addressed thousands of subcontracts, yet the Board found the making of the contracts "but a recurrent event in a familiar pattern" of the employer's usual method of operation. The Board found that the subcontracting in the period complained of did not materially vary from what had been customary in the past.

The Board also found the subcontracting did not have any significant impact on the employees' job interests. The Board quotes the trial examiner; "[t]he record in the instant case does not even establish slow erosion, let alone elimination of, jobs arising from the contracting out of work." 150 NLRB at 1576.

The Board also considered that the union had sought on several occasions, albeit unsuccessfully, contract language that limited the subcontracting. The same is true here. The parties bargained over contracting out, but in the end, came to no agreement and the master contract between the union and the employer is silent on the issue.

It seems the determination of the nature of the work is influenced by the effect created by the removal of that work. In this case, I do not see a tangible effect and, for that matter, a removal of any work possessed by the bargaining unit.

CONCLUSION

Balancing the factors last referenced by the Commission in *Skagit County*, combined with the considerations contained in the discussion above, I conclude that the employer and agency did not contract out work that had been bargaining unit work and no unfair labor practice occurred.

Non-bargaining unit members have done similar work in the past, with a very mixed practice of when it is done by employees and when it is done by contractors. Besides that, the union specifically waived the precedential value of past work the employees did on cottages and specifically agreed in the master contract to void all past practices. The agency laid no employee off as a result of the contracting out. No employee saw a reduction in pay or received any impact from the contracting decisions complained of here. The union had a general opportunity to bargain over the subject of contracting out, but the parties came to no agreement.

Since the employer did not contract out bargaining unit work, the employer did not interfere with the rights of employees nor refuse

to bargain over a mandatory subject, so no unfair labor practice occurred. While the agency's apparent delay of the projects is not a shining model of good labor relations, it also does not rise to a violation of the PSRA. All of these factors require that I dismiss the complaint.

FINDINGS OF FACT

1. DSHS is an agency of Washington state government that employs state employees in Consolidated Support Services (CSS) at Medical Lake, Washington.

2. WFSE is a union certified to be the exclusive representative of employees of the agency, including the employees at CSS.

3. CSS employees perform traditional construction trades and crafts work for DSHS institutions located at Medical Lake, Washington.

4. CSS employees generally perform skilled maintenance and operation tasks funded by operational funds, and occasionally do construction or remodeling funded by capital projects. Outside contractors also do capital construction and remodeling at the DSHS institutions at Medical Lake and throughout the state.

5. CSS employees performed some of the major remodeling of four previous cottages at Lakeland Village starting in 1998 and 2000. Outside contractors also worked on those remodels.

6. Although capital projects funded those previous cottage remodels and CSS employees performed part of those jobs, the

agency and the union agreed the 2000 remodeling set no precedent.

7. In 2004, union stewards at CSS heard about the agency's plan to remodel the remaining four cottages. The agency and the union representatives at CSS discussed the project in a union-management meeting. At that meeting, the union representatives indicated that the CSS employees wanted to do the work.

8. The issue came up again in the spring of 2005. The agency proposed a short time line within which CSS employees could not do the work. The union then proposed doing only one of the cottages while the agency contracted out the work on the other two.

9. After July 1, 2005, the agency let bids for the remodeling of the remaining four cottages.

10. The agency and the CSS employees discussed replacing the flooring in the PAT Center at Lakeland Village as a potential project as early as 2003. The project was the replacement of vinyl flooring and coving in an area of a therapy building, including leveling the floor, and abating the old adhesive and asbestos.

11. The specifications for the PAT Center job required the use of a particular leveling compound that CSS employees were not certified to apply.

12. While the CSS employees did not do asbestos abatement work, CSS carpenters have previously laid flooring.

13. The agency and the CSS employees and union steward discussed the project without resolution again in 2004. In August 2005, the CSS union stewards found that the job had been let for bid.

14. The agency and the union had a long history of discussing whether CSS employees would complete particular projects or whether the project would go out to bid, but the employer and the union placed language in the 2005-2007 master agreement that nullified any past practice not specifically referenced in the agreement.

15. The employer and the union bargained the subject of contracting out during the negotiation of the master agreement in 2004, but did not add language to the agreement concerning that subject.

16. The work contracted out by the agency was not solely bargaining unit work, having been also performed previously by outside contractors.

17. The employees in the bargaining unit suffered no detriment as a result of the contracting out; there were no reductions and no change in the conditions of employment.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapter 41.80 RCW.

2. The employees involved here are "employees" and the state of Washington is an "employer" within the meaning of Chapter 41.80 RCW.

3. Since the work contracted out was not bargaining unit work, the employer had no obligation to bargain the decision to contract out that work under RCW 41.80.005(2) and 41.80.020. Consequently the employer committed no unfair labor practice under RCW 41.80.110(1)(e).

4. Since the work contracted out was not bargaining unit work, the employer committed no interference by contracting it out without bargaining. Consequently the employer committed no unfair labor practice under RCW 41.80.110(1)(a).

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are dismissed.

ISSUED at Olympia, Washington, this 12th day of January, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

KARL NAGEL, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.